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IN THE
SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1955.

No. 839.

THE BOARD OF COUNTY COMMISSIONERS OF WYANDOTTE COUNTY, KANSAS,
Petitioner,

vs.

WILLIAM J. HOWARD, INC., a Corporation Organized under the Laws of the State of Illinois,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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WILLIAM J. HOWARD, INC., a Corporation Organized under the Laws of the State of Illinois,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, The Chief Justice of the United States, and The Associate Justices of the Supreme Court of the United States:

This is a petition by the Board of County Commissioners of Wyandotte County, Kansas, a municipal corporation, for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit rendered in the above-entitled cause, which affirmed the judgment of the United States District Court for the District of Kansas.

OPINION BELOW.

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit (R. 3, App. A1) is not yet officially reported. No opinion was written by the District Judge.

JURISDICTION.

The judgment of the United States Court of Appeals for the Tenth Circuit was filed and entered February 7, 1956. Petitioner's petition for rehearing was timely filed on February 24, 1956, and was denied by order entered March 2, 1956.

The jurisdiction of this court is, accordingly, invoked by virtue of 28 U. S. C., Sec. 1254, Paragraph (1), 62 Stat. 928.

QUESTIONS PRESENTED FOR REVIEW.

1. The public improvement contract of the petitioner and respondent must be enforced between the parties according to all of its terms in the absence of a determination of bad faith, fraud or deceit.

2. The Court of Appeals committed error in the interpretation of the public improvement contract in the following particulars:

(a) That it did not follow the general law of the State of Kansas.

(b) The opinion and judgment rendered and entered is in conflict with the decisions of United States Courts of Appeals of other circuits on the same matter.

(c) The opinion and judgment is contrary to and in conflict with the decisions of the United States Supreme Court on the same matter.

3. The Court of Appeals, in affirming the District Court, has departed from the accepted and usual course of procedure in the introduction of documentary evidence in the nature of abstracts or summaries of voluminous records and documents without the supporting records and documents being before the Court, or in the jurisdiction, or being made available for inspection by the Court or counsel either before, during or after the trial.

STATEMENT.

An action was instituted in the District Court by the respondent against The Board of County Commissioners of Wyandotte County, Kansas, a *quasi* municipal corporation, for the recovery of $179,759.63 damages following a partial rebuilding of a bridge in Kansas City, Kansas. The subject bridge was partially destroyed by high water. The petitioner, pursuant to pertinent statutes of the State of Kansas, entered into a contract with the respondent for the partial rebuilding of the bridge for the sum of $326,719.66. Among other things, the contract provided for the construction of a new pier (No. 2) to be located in the channel of the river and replacement of parts of the superstructure between the existing piers and the new pier.

The contract consisted of a formal agreement and certain other documents, all of which are a part of the contract, namely, the Standard Specifications of the Highway Commission of the State of Kansas, numerous supplemental specifications to govern the work peculiar to the job in question; also detailed plans showing with precision

the exact location of all piers and the size and dimension of the parts of superstructure of the bridge.

The respondent submitted a written proposal, which forms a part of the contract, to perform the required work for the contract price above stated. The respondent, being the lowest bidder, was awarded the contract in question.

After the contract was awarded and the contract entered into, no alteration, modification or change was made to any part thereof, nor in the plans and specifications. No written orders were given by your petitioner to respondent for extra, special or force account work and none was requested by the respondent. The plans were admitted by the respondent to be good and sufficient.

Your petitioner, pursuant to Kansas statute, employed engineers to assist in the preparation of the plans and specifications and to perform certain other services.

The contract required completion within 300 days. The respondent, pursuant to notice to start work as provided in the contract, proceeded with the construction of the bridge and required a period of 778 days to complete the work, or a total of 478 days beyond the contracted completion time.

The plans for the construction show with certainty the exact distances between all piers, both new as well as those left in place. The respondent contended that prior to the awarding of the contract, it requested the engineer of your petitioner for the location of the site for the construction of the new pier and the engineer pointed to some debris upon the surface of the water and said such new pier was to be located in the bed of the river at the point where the debris appeared. The respondent contends that the excavation for the new pier was started at

such site. However, the respondent contends that it later discovered that such pointing was in error thus resulting in needless extra or special work on its part, for which the Court of Appeals sustained the allowance of $136,656.47. Your petitioner contends that the respondent was bound by the distance and location for the new pier as shown on the plans with exactness and by the provisions of the contract in locating the site for the construction of the new pier by virtue of the provisions contained in the supplemental specifications forming a part of the contract which provide "the contractor (respondent) must assume full responsibility for successfully carrying out the complete construction and for the fit of all members. Plans showing the detail of the existing structure may be inspected at the office of the County Engineer of Wyandotte County, Kansas, but the contractor (respondent) must make sufficient field measurements to determine definitely the actual distances between piers and the actual dimensions of other parts of the existing structure to be left in place in order to fit accurately the new work to the old."

The Court determined that the remains of the washed out Pier No. 2 changed its location. Your petitioner nor respondent had no knowledge of any such change in location and the Court did not so find. The supplemental specifications warned that there may have been displacement at the time the pier washed out and provided that the contractor should make his own determination as to the amounts of debris, etc., necessary to be removed in order to build the new pier (No. 2). See supplemental specifications App. Page A12.

The contract provided for partial payment to the respondent upon claims for payment being submitted by it on estimates of partial completion approved by the engineer. Such claims were made almost monthly during

the reconstruction. The respondent did not make any claim for extra compensation upon the basis for which damages are sought in the complaint. Claims for partial payment were made and accepted in the manner provided in the contract until the completion of the work, the first and last of which are shown at Pages 241 and 245 of the transcript of record. Shortly thereafter the claim herein for $163,087.66 was filed and was disallowed by your petitioner.

The respondent nowhere claimed, nor was any showing made, of bad faith, fraud or deceit on the part of your petitioner.

The Standard Specifications of the Highway Commission of the State of Kansas (which are uniform throughout the United States) contain provisions covering the allowance for payment of any special, extra or force account work, the pertinent parts of which are contained in the transcript of the record, Vol. II, Pages 186, 189 to 192 (App. A13). No supplemental agreement was requested by the respondent and none exists with respect to any of the work for which respondent claimed additional compensation, nor was any approval thereof given or made by the engineer in charge of such work, either in writing or otherwise, all as required by the aforementioned specifications.

The action was tried to the Court without a jury. The trial court separately heard and determined the question of liability of the petitioner and subsequently submitted the question of ascertainment of damages to a Special Master. Respondent's proof of damages before the Special Master consisted of production of copies of the ledger sheets and a cost summary, the first of which was an original record of the respondent and the second of which was kept by respondent during the course of its

business for the purpose of allocating costs. Other evidence to support respondent's claim for damages was in the nature of summaries prepared by respondent's auditors, not under the jurisdiction of the court and the supporting data for which was not in court nor offered or made available for the inspection of the Special Master or counsel prior to or after being received in evidence.

Upon completion of the contract there was a balance due of $16,671.97, which was held by your petitioner in partial satisfaction of the liquidated damage provision of the contract for failure to complete within the required time.

The respondent in this case is a citizen of the State of Illinois. Your petitioner is a *quasi* municipal corporation of the State of Kansas. The amount in controversy exceeds the sum of $3,000.00.

ARGUMENT.

I.

A Public Improvement Contract Must Be Enforced Between the Parties According to All of Its Terms in the Absence of a Determination of Bad Faith, Fraud or Deceit.

The contract in this case is typical of public improvement contracts which have been before the courts for interpretation and construction in a number of cases. The contract consisted of a written proposal submitted by the respondent wherein he proposed to furnish the material and perform the required work for the building of the bridge in strict accordance with the contract documents for the prices given in an attached schedule, the total of which prices constituted the contract price. In the pro-

posal the respondent declared that he had visited the site and carefully examined the contract documents relating to the work and would perform the work and furnish the materials in strict accordance with the contract documents for the sums set forth.

Annexed to and a part of the contract documents were a number of supplemental specifications in which it was provided that the Standard Specifications of the Highway Commission of the State of Kansas (which are approved by the Bureau of Federal Roads and uniform throughout the United States) were to be used in carrying out the rebuilding of the bridge, except where supplemental specifications were provided for certain of the work peculiar to the reconstruction of the bridge in question. The supplemental specifications specifically provided that they should govern when they were in conflict with the Standard Specifications. The supplemental specifications pertinent to this controversy are contained in the certified transcript of the record, Pages 9 to 13, inclusive, and for convenience are reproduced in the appendix hereto (App. A9-A12).

Also a part of the contract documents were a complete set of plans showing in detail the dimensions of various parts of the bridge including the distances between piers, and location of Pier No. 2 to be constructed under the provisions of the contract, and the size and dimension of various parts of the superstructure, all of which were admitted by the parties hereto to be complete and sufficient to carry out the work provided for in the contract. Because of the character of the work required by the contract, certain supplemental specifications were provided to warn and advise contractors submitting proposals of the uncertain conditions which might be encountered in connection with the work, such as Paragraph 2 of the

special provisions of supplemental specification 12 appearing at Page 12 of the certified transcript of the record wherein it is stated that portions of the debris from old Pier No. 2 had been removed and that foundation and steel sheet pile remained in place except as they may have been displaced at the time the pier was washed out, and further warned that it was not guaranteed that all of the debris had been removed and that the contractor (respondent) should make his own determination as to the amount of debris, piling, etc., which it would be necessary for him to remove in excavating and building at Pier No. 2. The supplemental specifications further provided that the contractor (respondent) must make sufficient field measurements to determine definitely the actual distances between piers and the actual dimensions of the other parts of the existing structure to be left in place to fit the new work to the old.

Without being burdensome and to eliminate repetition, it is fair to say that the contract and all of the documents forming a part thereof were complete and accurate in every detail and entirely sufficient for the purpose of accomplishing the contemplated work. The respondent has made no complaint through this case of any error or insufficiency in the plans, specifications or contract documents.

Nowhere in this case has there been any claim, finding or determination of misrepresentation, bad faith, fraud or deceit on the part of petitioner.

The well settled rule of law in the interpretation and construction of public improvement contracts is that the parties are bound by the provisions of the contract as entered into in the absence of a finding and determination of bad faith, fraud, deceit or misrepresentation which amounts to a warranty. This rule is laid down in *Middle*

West Const. v. *Metropolitan Dist.*, 2nd Cir., 133 F. 2d 468, 470, wherein it is stated:

> "The contention that, if the plaintiff cannot recover under the contract, it should be allowed recovery 'outside of the contract' cannot be sustained on the record. There was no fraud, misrepresentation or misleading by the defendant in the plans and specifications upon which the contract was based."

See also *Highway Const. Co. of Ohio* v. *City of Miami, Fla.*, 5th Cir., 126 F. 2d 777, 781, where the Court specifically holds that in absence of a showing of bad faith, fraud or deceit on the part of the engineer, the city, or its agent, the contractor cannot recover for extra work not authorized by the contract or the engineer.

The leading case on misrepresentation connected with public improvement contracts is *MacArthur Bros. Co.* v. *United States*, 258 U. S. 6, 66 L. Ed. 433, 42 Sup. Ct. Rep. 225, wherein the Supreme Court in passing upon the question of misrepresentation stated:

> "In the case at bar the government undertook a project and advertised for bids for its performance. There was indication of the manner of performance, but there was no knowledge of impediments to performance, no misrepresentation of the conditions, exaggeration of them, nor concealment of them; nor, indeed, knowledge of them. To hold the government liable under such circumstances would make it insurer of the uniformity of all work, and cast upon it responsibility for all of the conditions which a contractor might encounter, and make the cost of its projects always an unknown quantity. It is hardly necessary to say that the cost of a project often determines for or against its undertaking."

II.

The Court of Appeals Did Not Follow the General Law of the State of Kansas.

This case being one involving the interpretation of a contract, the general law of Kansas should be applied under the doctrine and authority established in the case of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 Sup. Ct. Rep. 817, 82 L. Ed. 1188.

Like cases arising out of the construction of contracts for public improvements have been decided by the Supreme Court of Kansas and rules of general law thereabout have been established.

The Court of Appeals in its opinion and judgment entered herein (App. A12) did not cite, discuss or follow any of the like or similar cases which your petitioner seriously contends are controlling in the consideration of this cause.

One of such cases is *Hutchinson* v. *White*, 80 Kan. 37, 101 Pac. 458. In that case the City let a contract according to plans and specifications prepared by its engineer for the digging of a canal. The specifications provided the dirt should be deposited in a specified space. Later it was determined the space designated would not contain the dirt. The size of the dumping grounds was clearly stated. The engineer had made an error and miscalculated the space, causing much additional labor to what would have been necessary if the mistake in the specifications had been discovered earlier. The contractor made a claim for extra work. The Supreme Court of Kansas held that the mistake was a mere error in mathematics and denied recovery and in passing upon the responsibility of the contractor stated:

> "A careful contractor would have ascertained whether the fifty-foot strip reserved for the dirt ex-

> cavated was sufficient or not. When the contractor discovered that it was insufficient the question should have been settled by the parties in the manner provided in the contract. The canal, as finally constructed, was just as the contractor and the city contemplated when the contract was entered into. Each party knew the dimensions of the canal, and by a proper use of ordinary mathematics could have ascertained how much dirt would have to be excavated and how much space it would occupy when removed. Whatever misleading or erroneous conclusions might be reached by either party in the manipulation of figures concerning these problems, the practical fact stood clearly before them that the contractor had agreed to excavate and remove all the dirt from the canal and deposit it upon the adjacent land. This was the work he undertook to do. Each of the parties understood this alike. Nothing could mislead them into a misconception or misunderstanding as to this proposition, and no mathematical measurement or estimate could affect the work to be done."

Another case is that of *Scherrer* v. *State Highway Comm.*, 148 Kan. 357, 80 P. 2d 1105. This case involved excavation for a state highway, the construction of which was subject to the Standard Specifications of the Highway Commission of the State of Kansas, being the same Standard Specifications involved in the present cause. In that case the plaintiff, the contractor, brought an action against the State Highway Commission on the theory that the plans and specifications furnished by the Commission stated there would be so many yards of rock and so many yards of earth, and that the plaintiff made a bid to excavate unclassified materials on the basis of the proportions of earth and rock given in the specifications, and that as a matter of fact it was necessary to move a substantial amount of rock over and above the amount given in the specifications, and that the plaintiff should there-

fore be allowed to recover the added expense he was put to in removing the rock. A demurrer to the petition was filed by the State Highway Commission and was sustained in the District Court, which action was thereafter affirmed by the Supreme Court. The court, in disposing of this case, stated in its opinion as follows:

> "How can a contractor who examined these plans and specifications, made this proposal, and signed this contract, say he had a right to rely on the quantities named in the plans? The very nature of the type of bid called for precludes such a construction. The bid being asked to be made on unclassified excavation was notice to plaintiffs that a careful examination should be made so that the proportion of rock and earth might be known and correctly calculated.
>
> "Plaintiffs bring several authorities to our attention and rely on them to sustain their position. Many of them are federal cases. Some of them are discussed and distinguished in *MacArthur Bros. Co. v. United States*, 258 U. S. 6, 11, 42 S. Ct. 225, 66 L. Ed. 433. In that case the petition of the plaintiff alleged that the government had misrepresented a proposed contract by stating that a portion of the work would be done in the 'dry' and a portion of it in the 'wet' at a cost greatly exceeding what it would have been had it been done the other way. The contractor had made a proposal and examined specifications containing provisions about the same as those we have here. The company contended certain conditions and surrounding circumstances amounted to misrepresentation by the United States. In dealing with this contention the court said:
>
> " 'But in reality there was no representation by the government, nor is it alleged that the government had knowledge of the conditions or means of knowledge superior to the knowledge of the company. The latter acquired knowledge only by the aid of divers as its work progressed. Such being

the situation, does not the case present one of misfortune rather than misrepresentation? It is true that the government's proposal was for a certain part of the work to be done in the dry, but it made no representation of the conditions that existed enabling it to be so done or precluding it from being so done.'

"* * * We feel that the MacArthur Brothers case is in point here. See, also, *H. W. Golden & Son* v. *Inhabitants of Town of Marblehead*, 68 F. 2d 875, also *Elkan* v. *Sebastian Bridge Dist.*, 291 Fed. 532."

For another recent case of the Supreme Court of Kansas to the same effect see *Neale Construction Company* v. *Topeka Township Sewer District*, 178 Kan. 359, 285 P. 2d 1086.

The general law of Kansas therefore is that the parties are bound to perform under the terms of the contract and may recover only under the provisions therein contained, and not outside the contract unless it may be legally avoided by a finding of bad faith, fraud, deceit or misrepresentation amounting to a warranty. Furthermore the Supreme Court of Kansas has followed the decisions of the Supreme Court of the United States in the *MacArthur Brothers case, supra*, and the decisions of Courts of Appeal of circuits other than the Tenth Circuit.

III.

The Opinion and Judgment of the Court of Appeals of the Tenth Circuit Are Contrary to and in Conflict with Decisions of the United States Supreme Court and United States Courts of Appeal of Other Circuits on the Same Matter.

The Court of Appeals of the Tenth Circuit in its opinion has determined liability upon your petitioner by hold-

ing that it was the duty of your petitioner to furnish the correct site for the work. The Court in its opinion also decided that the pointing out of a spot where part of the piling of the old pier showed on the surface of the water was the designation of the place where the new pier should go.

The position of your petitioner is that if recovery is allowed in this case it must be under the provisions of the contract, but before an award of damages is sustained, there must be a showing and finding of bad faith, deceit, fraud or misrepresentation amounting to a warranty before a recovery may be had outside of the terms of the contract. The pointing out of a spot in the river as relied upon by the Court of Appeals in establishing liability does not constitute bad faith, fraud, deceit or misrepresentation for the reason that such pointing out was made prior to the time a proposal was submitted by the respondent. The respondent at the time of submitting the proposal represented that he had visited the site of the work and was familiar with the contracts which included the plans.

Furthermore, the engineer could not alter the plans or specifications which clearly showed the correct excavation site by his informal conversation with the respondent prior to the submission of a proposal and the execution of the contract.

If the informal pointing out of objects on the surface of the water is a sufficient designation of the place of excavation, then there is no need for plans showing, with certainty, the exact location. This is especially true in view of the warning to bidders contained in the supplemental specifications as to the uncertainty of conditions likely to be encountered because of the displacement of the debris of old Pier No. 2 at the time it washed out. The supplemental specifications made a requirement upon

the respondent to make sufficient field measurements to determine the actual distances between piers. The Court in its opinion stated:

> "The contract provided for the relocation of Pier No. 2 at the same spot where the destroyed pier had been located."

While there is no such provision in the contract, it so happened that the plans for the construction of a new pier showed thereon a distance in feet which also approximated the location of the old pier. Further in the opinion the Court discussed the requirement for setting stakes by the engineer. However, respondent requested no stakes and no stakes were set designating the site for the excavation for Pier No. 2, upon which a judgment was made against your petitioner.

The provisions for the performance of special, extra or force account work contained in the specifications likewise were before the Court. Had the respondent, after executing the contract and beginning work, requested the setting of stakes to locate the excavation site for Pier No. 2, then in that event under the general specifications it was incumbent on the engineer to compiy with his request. The record is clear that no requests for the setting of stakes to locate the excavation site were made by the respondent at any time (Certified record, Pages 123 and 170).

Partial payment of the contract price was made to respondent on claims submitted during the course of the work. Such payment was accepted by respondent without demand for extra compensation as required in this cause.

Like public improvement contracts have been before the United States Supreme Court in the leading case of

MacArthur Brothers Company v. *United States*, 258 U. S. 6, 66 L. Ed. 433, 42 Sup. Ct. Rep. 225, in which case it was claimed that the United States had made misrepresentations in that certain of the work would be done in "dry" and a portion in the "wet" whereas it was impossible to do any of the work in "dry" and it was all done in the "wet" at a cost greatly exceeding what it would have been had it been the other way, The action was dismissed in the Court of Claims, which action was affirmed by the Supreme Court, and, in disposing of the case, held:

> "The elements which existed in each of the cited cases are absent from the case at bar. In the case at bar the government undertook a project and advertised for bids for its performance. There was no indication of the manner of performance, but there was no knowledge of impediments to performance, no misrepresentation of the conditions, exaggeration of them, nor concealment of them; nor, indeed, knowledge of them. To hold the government liable under such circumstances would make it insurer of the uniformity of all work, and place upon it responsibility for all of the conditions which a contractor might encounter, and make the cost of its projects always an unknown quantity. It is hardly necessary to say that the cost of a project often determines for or against its undertaking.
>
> "Judgment affirmed."

The rule laid down in the MacArthur Brothers case has been adhered to and followed by the Supreme Court of Kansas in the case of *Scherrer* v. *State Highway Comm.*, *supra*.

The opinion of the Court of Appeals, Tenth Circuit, is in conflict with the decision of the Court of Appeals, Second Circuit, rendered in the case of *Middle West Const.* v. *Metropolitan Dist.*, 133 F. 2d 468, 2nd Cir. The facts in

the Second Circuit case are that a sewer contract between the parties was completed and payment therefor made at the prices listed in the contract from which was deducted an amount for liquidated damages for delay in completion. The contractor thereafter claimed additional compensation asserting that a certain type of construction was "extra" because of the manner in which the work must be performed, the details of which are set forth in the opinion. The contractor also made claim for extra compensation for removing certain underground structures and asserted that such were not indicated on the plans. The contentions made in the foregoing case from the Second Circuit are substantially the same as those urged by the respondent herein.

The Second Circuit, in passing upon the contentions of the contractor with respect to the right to recover extra compensation, held:

> "No claim in writing was made when the work was being done. The contractor cannot fairly contend that the work constitutes extras under the contract without complying with the contract provisions as to extras. The claim involves only work covered by the terms of the contract."

The Second Circuit, in its opinion on the right to recover outside of the contract in the absence of a finding of fraud, misrepresentation or misleading, held:

> "The contention that, if the plaintiff cannot recover under the contract, it should be allowed recovery 'outside of the contract' cannot be sustained on the record. There was no fraud, misrepresentation or misleading by the defendant in the plans and specifications upon which the contract was based."

The opinion of the Court of Appeals, Tenth Circuit, is likewise in conflict with the Court of Appeals, Fifth

Circuit, as determined in the case of *Highway Const. Co. of Ohio* v. *City of Miami, Fla.*, 5th Cir., 126 F. 2d 777. In that case a contractor claimed the right to "extra work" where no order for extra work was made by the engineer in writing, which is the fact situation in the case at bar. In disposing of this matter, the Fifth Circuit stated as follows:

> "It is further without dispute that as the work progressed under the seven contracts the engineer made monthly estimates of work done and materials furnished and the Construction Company was paid ninety per cent of his estimates. For more than six months the Construction Company each month received this ninety per cent payment for work done, materials furnished, and extra work. Its officers in charge of the projects made no complaint, submitted no claim, and disputed no estimate until more than three months after the work had been completed, and after the final report had been published by the engineer. It then came forward and made large additional claims. Under the theory now presented, the contractor held back each month claims in excess of $50,000 and accepted ninety per cent of the money on estimates of the engineer for work, materials, and extras, and this in the very teeth of the contracts which provide that claims be made known on or before the 25th of each month—the engineer's estimate day. This conduct of the Construction Company does not add up to open and fair dealings."

In the present case the respondent under the provisions of the contract was entitled to partial payment upon estimates of completion. Almost monthly the respondent submitted sworn claims to your petitioner based upon such estimates. The first and last of such verified claims submitted by respondent are shown in the certified transcript of the record at Pages 241 and 245. The respondent during this period of time made no claim for extra compensa-

tion in the nature of the claim upon which the complaint in this action is based. The claims submitted by the respondent and allowed by the petitioner were accepted. Several months after the completion of the work, the claim now involved in this action was filed by the respondent and denied by your petitioner.

IV.

The Court of Appeals in Affirming the Judgment of the District Court Has Departed from the Accepted and Usual Course of Procedure in the Introduction of Documentary Evidence in the Nature of Summaries of Voluminous Records and Documents Without the Supporting Records and Documents Being Before the Court, or in the Jurisdiction, or Available for Inspection by Court or Counsel Before, During or After the Trial.

Shortly after the filing of the complaint your petitioner moved and secured an order of the District Court requiring the respondent to produce and lodge with the clerk certain documents, viz., (a) the respondent's Weekly Progress Reports from August 8, 1946 to April 9, 1948; (b) respondent's payroll records for the same period; and (c) photographs taken at the site. The respondent in response to such order lodged the foregoing items with the clerk. No other orders for the production of books, records or documents were entered and the respondent did not voluntarily lodge with the clerk any other of its records, papers or documents connected with the subject of this litigation.

The question of determining the amount of damages was referred to a Special Master.

The trial on the amount of damages came on for hearing, at which time the respondent offered the testimony of

two of its auditors and accountants. Their testimony appears at Pages 210 to 224, inclusive, of the transcript of the record filed herein. Such auditors and accountants produced summaries which had been compiled from cash disbursement books, journal books, regular books of the company, cost sheets maintained on the job, invoices, check registers, check stubs and "such other sources of information reflecting the amounts paid for the different items and from the duplicate payroll records." It must be pointed out here that none of the books, records, papers or other sources of information, except the general ledger and cost sheets had been produced or offered in evidence or made available to the Court or counsel prior to the offer of such summaries in evidence. The general payroll records of of the company had been lodged with the clerk under the order above-mentioned but misplaced while in the custody of the clerk. Respondent admitted duplicate payroll records were in its possession but were not produced or offered. The entire evidence to support respondent's proof of damages consisted of the summaries of the mass of records, papers and documents then in the possession of the respondent in its Chicago office. Your petitioner repeatedly objected to the offer of such summaries for the reason that they had been compiled from the journals, cash books and other records in the possession of the respondent and not the best evidence; and that such summaries were compiled by the witness and not subject to examination under the jurisdiction of the Court; and for the further reason that they were allocations of percentages without a showing as to the basis upon which allocations were made; and on the further ground that the witness was the judge of what should be included and what should be excluded from the compilation of the summaries and invading the province of the Court; and for the further reason that the books, records and papers themselves

should be presented, which repeated objections were disallowed by the Special Master.

The opinion of the Court of Appeals is based on the erroneous assumption that your petitioner had the opportunity to inspect such records.

The first information or knowledge of the type of proof respondent intended to offer was at the time of the opening of the trial before the Special Master. Your petitioner had assumed that respondent would offer competent evidence in proof of its claim for damages and had no reason to assume that it would be confronted with summaries prepared in advance outside the jurisdiction of the Court and the basic supporting books of account, papers, documents and other evidence would not be offered in support thereof. If such rule of evidence is sustained, it will constitute a complete departure from the already well established rules relating to the admission of summaries of the contents of voluminous records.

The Federal Courts have on numerous occasions ruled upon the question of the introduction of summaries of voluminous records and have uniformly held that before such summaries are admissible that the mass of material supporting such summaries must be produced or made available. The production of books, records, papers and documents is a prerequisite to the admission of testimony construing the entries made therein.

This rule was again reviewed in the case of *Berthold-Jennings Lumber Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 80 F. 2d 32, 8th Cir. This case denied the preferential payment of certain claims for overcharges made by a carrier in intrastate commerce, but were allowed as general claims. Certain of the basic records had been destroyed and appellants had offered summaries of the voluminous records

prepared by an expert. In passing upon the question the Eighth Circuit, in its opinion, stated (l. c. 44):

> "The ledgers of certain grain commission firms were shown to have been destroyed. Before their destruction, an accountant copied off a portion of the record entries respecting the cars in which he was interested, but failed to make a complete copy. In many instances a complete copy would have shown whether an interstate shipment was involved. Appellants contend that these copies were competent as a summary of voluminous records made by an expert. There is no basis for this contention. The books that had been destroyed were not the books of the carrier. They, of course, were not produced, but neither was there any evidence that would have made them competent if the originals had been produced. While, under certain limitations, an expert may give a summary of his examination of voluminous records, if proper foundation has been laid with reference to such records so as to make them competent evidence, still to be admissible the records must at least be produced and be made available to the opposite party for the purpose of cross-examination. Ordinarily, the rule is one of convenience which goes no further than to permit a summary of the mass of records otherwise in evidence, or at least admissible in evidence and actually produced in court. *Lemon* v. *United States*, (C. C. A. 8) 164 Fed. 953; *Davis* v. *Supreme Council of Royal Arcanum*, 195 Mass. 402, 81 N. E. 294, 10 L. R. A. (N. S.) 722, 723, 11 Ann. Cas. 777; *Dohmen Co.* v. *Niagara Fire Ins. Co.*, 96 Wis. 38, 71 N. W. 69; *Stolz* v. *Scott*, 28 Idaho 417, 154 Pac. 982; Wigmore (2d Ed.), Par. 1230; Jones on Evidence (2d Ed.), Vol. 2, p. 767. The proffered testimony was clearly hearsay and incompetent."

Another case involving the introduction of summaries of voluminous records is that of *Chicago Board of Trade* v. *United States*, 223 F. 2d 348, District of Columbia Circuit.

There the Court held that a summary of certain cost figures prepared by an expert for Western Union in summary form was admissible and competent evidence by reason of the fact that all of the underlying material was assembled at Western Union's New York office. At the end of the first day's hearing, a recess of two months was ordered by the trial court to enable opposing counsel and its experts to examine the material and check the accuracy of the proposed exhibits. The Court held that inasmuch as opposing counsel had been given two months' time to examine the original records and prepare for their cross examination, the summaries were proper and competent evidence.

In a prosecution under the Criminal Code of the United States a like ruling is announced in the case of *Greenbaum v. United States*, 80 F. 2d 113, 121, 9th Cir. The reasons for the exclusion of the summaries pointed out in that case are equally applicable to the present cause. In passing upon this question the Ninth Circuit stated:

> "On the other hand, such intricacy and extent of detailed figures, massed in evidence against an accused man, place him in a perilous position. Experts differ on theories of accounting; they are not unknown to assume the functions of advocacy instead of detached analysis or statement; nor are they always free from error and mistake of fact and figuring as well as in theory. This implies no reflection on the expert in this case, but the human factor in experts' testimony requires that they shall not be permitted to bring into the case statements of their conclusions as to books not available for the purpose of cross examining the experts as to such conclusions. Courts generally, and this court in particular, have been careful to lay down the protective requirements necessary to minimize the risk to the accused arising from such opinions of experts. In an opinion of Judge Rudkin, the court has

stated the rule to be, where books of account are offered as evidence against one not a party chargeable with an interest in their keeping, that: 'In order to lay the foundation for the admission of such evidence it must be shown that * * * the entries (in the books) were either original entries or the first permanent entries of the transactions.' *Osborne* v. *United States*, (C. C. A.) 17 F. 2d 246, 248, certiorari denied 274 U. S. 751, 47 S. Ct. 765, 71 L. Ed. 1332."

The foregoing rule is likewise the law of the State of Kansas. See *Clark* v. *Moffett*, 136 Kan. 711, 18 P. 2d 555, and *Cornner* v. *Kloehr*, 144 Kan. 588, 61 P. 2d 1346. Each of these cases holds that summaries of voluminous books and records may be testified to, conditionally admitted in evidence and may be considered advisory and informative, provided the proper foundation has been laid by having the original books and records themselves in court and available to the opponent for inspection, verification and cross-examination.

CONCLUSION OF ARGUMENT.

The respondent in this case contracted to perform the complete rebuilding of the bridge in question for the sum of $326,719.66 and proposed as a part of such reconstruction the excavation for a new pier (No. 2) for the sum of $53,400.00. The opinion of the Court of Appeals in this action has sustained the recovery of $136,656.47 damages allegedly because of a mistake in the location of the site for the excavation for such pier. The respondent in this case had already been paid 90% of the price proposed for the excavation of Pier No. 2, being approximately $48,060.00. It seems incredible that the respondent herein should now be allowed a recovery of $136,656.47, or approximately 40% of the total contract

price in addition to the $48,060.00 already paid for the same work under the provisions of the contract.

The allowance sustained by the Court of Appeals was clearly outside the provisions of the contract. Therefore without a showing of deceit, fraud, bad faith or misrepresentation, the respondent is not entitled to a recovery outside of the provisions of the contract according to the holdings in the various cases hereinbefore cited.

The manner of proof permitted by the Special Master and affirmed by the Court of Appeals in its opinion in the admission of summaries of voluminous records without the supporting papers, records, accounts and documents no doubt influenced the allowance of such an exaggerated judgment. The summaries received in evidence upon which the judgment is based were compiled by the respondent's own auditors and accountants, thereby permitting such auditors and accountants to be the sole judge of what items were to be included in or excluded from the total figure upon which respondent's demand for a judgment is based.

Your petitioner therefore respectfully suggests that the affirmance of the District Court's judgment by the Court of Appeals in the admission of summaries in evidence is a departure from the usual course of judicial proceedings not to be sanctioned. Your petitioner further respectfully suggests that this petition for a writ of certiorari to the Court of Appeals, Tenth Circuit, be granted in accordance with the provisions of the law and rules of this Court, because the decision of the Court of Appeals in this action is in conflict with the decision of Courts of Appeal of other circuits on the same matter, as heretofore pointed out, and in conflict with the established general law on this matter as decided by the Supreme Court

of the United States and by the Supreme Court of the State of Kansas.

Wherefore, your petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Tenth Circuit in the above entitled cause.

Respectfully submitted,

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